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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 61

IN THE MATTER

of

SEELEY TUBE AND BOX COMPANY,

Debtor-Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR DEBTOR-PETITIONER

BILDER, BILDER & KAUFMAN,
Attorneys for Debtor-Petitioner,
60 Park Place,
Newark 2, New Jersey.

WALTER J. BILDER,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611

REPLY ARGUMENT

In its *Argument,* respondent says (Brief 7): "the referee was induced to confirm the arrangement on the representation by petitioner's counsel that the Government's claims could be filed thereafter", and further on respondent says (Brief 8): "the plan was confirmed solely on the representation that provision could be made for the filing and determination of the Government's claims." These assertions, however, are contrary to fact.

A false basis for these untrue assertions is furnished by the way in which respondent presents the pertinent colloquy between the Referee and the attorney for the debtor. Respondent (Brief 4) begins to quote from this colloquy at a point which makes it seems as if the Referee initiated the colloquy with an inquiry as to a claim of the respondent, viz: "Is there a claim of the Picatinny Arsenal?" The truth is that the colloquy began with a statement *by the debtor's attorney,* viz:

> "Mr. Freeman: I am about to present to your Honor a petition to limit the Picatinny Arsenal to file a claim in this proceeding. I am asking your Honor for an order to show cause to be served upon the Picatinny Arsenal and the United States Attorney, who is the duly recognized representative of any Governmental Agency that may be involved in these proceedings. Mr. Ryan, I do not know whether you have any interest in this application, but I merely want to call it to your attention." (R. 15a)

From this it is manifest that debtor's attorney was not making a representation to induce the Referee to confirm the arrangement which otherwise the Referee would not have confirmed. What debtor's attorney was doing was to get the Referee to fix a time for respondent to make proof of a claim which, under the express language of Section 369, *would survive confirmation;* and the Referee plainly showed that he understood the government's (possible) claim *to be one of that nature* (R. 16a and R. 17a). What re-

spondent is attempting to do then is to change an actual case of *mutual mistake* on the part of the Referee and the debtor's attorney into an imagined case of a knowingly false representation made by the debtor's attorney to the Referee and a reliance of the Referee on such false representation.

Indeed, a direct refutation of respondent's above said misstatements is furnished by the following statement made in respondent's own brief filed with the court below (Brief 12):

> "The Government was not represented with respect to these claims at the confirmation hearing, *and if the debtor's counsel had remained silent with respect to the claims now in dispute, the plan might have been confirmed, and those claims thereby discharged.*" (Our italics.)

In other words, respondent, in its brief to the court below, frankly acknowledged that the Referee would have confirmed the arrangement without any mention being made of respondent's unasserted possible claim, and that in such case respondent's claim would have been discharged. So far then from being an inducement of the Referee's confirmation of the arrangement, the debtor's attorney's mentioning of the government's unasserted possible claim was merely a gratuitous incident of the hearing on confirmation, arising from a misapprehension of the nature of that claim by the debtor's attorney.

Respondent argues (Brief 9) as if the statements made by debtor's attorney with reference to a possible claim of respondent were made for the very purpose of *informally amending the schedules* to include that claim. In doing this, respondent plainly ignores the crucial fact that the debtor's attorney's mentioning of the government's possible claim was prompted solely by the fact that he mistakenly supposed the possible claim of the respondent to be one in the category of Section 369(3) and therefore *one which did not require scheduling but did require the*

fixing of a time for proof after confirmation. Thus, it is manifest that what debtor's attorney intended to do was not to informally amend the debtor's schedules but was only to have the Referee fix a time for the proof of a possible claim which he (debtor's attorney) mistakenly supposed was in that category of claims under Section 369 *which did not need to be scheduled.* Thus, respondent's argument attempts to change the actual situation in this case into a fundamentally different imagined situation.

In a footnote (Brief 10) respondent plainly acknowledges that both the Referee and debtor's attorney mistakenly believed the possible claim of respondent to be within Section 369(3). But respondent goes on to say:

> "Had the assertion not been made, the referee *might* have held up confirmation until the claims were scheduled or filed."

This doubly hypothetical assertion is sufficiently answered by a far less hypothetical assertion by us that if debtor's attorney had not mistakenly believed that respondent's possible claim was in the category of Section 369(3) and therefore one which would survive confirmation, he doubtless *would not have mentioned* this (possible) claim, in which event, to quote from respondent's brief filed with the lower court (Brief 12): "if the debtor's counsel had remained silent with respect to the claims now in dispute, the plan might have been confirmed, and those claims thereby discharged."

In the same footnote (Brief 11), respondent, in substance, says that if the debtor's attorney had remained silent as to respondent's (possible) claim, "the Government *could have* petitioned for review of the confirmation order on the ground that the arrangement did not 'include provisions modifying or altering the rights of unsecured creditors generally or of some class of them.' " It is sufficient to say of this contention that it is not germane to the question before this Court. But even if it were germane, this contention would be disposed of by the fact

that respondent did not file a petition to review the Referee's order of confirmation; and the hypothetical contention that respondent might have filed such a petition if what happened at the hearing had not happened, is one which can scarcely avail respondent in this proceeding.

Respondent contends (Brief 10 and 11) that a reason for "holding that claims may be considered to have been informally scheduled when the interests of justice so demand is the fact that such a doctrine has long been accepted in connection with the filing of proofs of claim." As supposed authority, respondent cites cases in which the filing of an informal *proof of claim* was held to be effective. But these cases do not support respondent's argument-by-analogy. In *J. B. Orcutt Company* v. *Green*, 204 U. S. 96, it was held that the presentation and delivery of *a proof of claim* to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3443), §57, when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. In the case of *In re High Point Seating Co.*, 181 F. 2d 747, it was held that where public accountants retained by debtor pursuant to an order made and entered in proceeding under Bankruptcy Act for an arrangement with creditors, wrote to a creditor and requested submission of a detailed statement of the indebtedness, and creditor sent such a statement to accountants, but creditor's claim was inadvertently omitted from debtor's schedule, and creditor had no knowledge of arrangement until after plan had been confirmed, creditor's claim, though not scheduled, was sufficiently proved to be perfected through an amendment. Bankr. Act, §§301 *et seq.*, 367, 369, 370, 11 U. S. C. A. §§701 *et seq.*, 767, 769, 770. The court said:

> "But unverified *written claims* of a creditor have been treated by this court as capable of amendment if

> presented in time. Here, there was a *written claim* presented to the auditors appointed by the court at the instance of the debtors to collocate the indebtedness of High Point Seating Company, Inc. *Upon the basis of this writing the report of the auditors set forth the claim, and the report was filed by them with the referee* on August 2, 1947. * * * " (Our italics.)

and further on the court said:

> "*In re Kessler,* 2 Cir., 184 F. 51, 52, we sustained and allowed to be put in formal proof *a claim which had been submitted without verification to an assignee for the benefit of creditors under the state law, and was thereafter transmitted by the assignee to a receiver in bankruptcy, and remained in his possession as receiver and thereafter as trustee.* * * * " (Our italics.)

This cited case of *In re Kessler* is the third case mentioned by respondent in its said footnote. In the case of *In re Patterson-MacDonald Shipbuilding Co.,* 293 F. 190, *a letter written to a trustee,* who was occupying premises leased to bankrupt, several months after the adjudication, by the lessor, inclosing official statement of delinquent taxes on the property, which under the lease bankrupt was obligated to pay, and asking their payment, was *held* to contain the essentials of a claim against the estate, sufficient to permit its amendment into a formal claim when more than a year after the adjudication, the trustee surrendered the leased premises. The court said:

> "That the letter sets out, and was intended as, a claim against the estate, seems clear. Certainly it was not against the trustee as an individual. True, it does not 'meet the requirement' of the statutory proof of claim. But that is the justification for and not a bar to amendment. It does, however, meet most of the requirements and contains most of the essentials prescribed by statute and order in proof of claim—

> *enough of both to give to the letter the substance of a proof of claim,* and to warrant amendment to supply the absent items of proof. It is (1) a statement in writing; (2) signed by a creditor, the term including an agent; (3) setting forth the claim; (4) the consideration therefor; (5) that no payments have been made thereon; (6) that the sum claimed is justly owing from the bankrupt to the creditor, if not paid to the tax collector; and (7) with defective title of the bankruptcy proceedings; and it omits only title of court, verification, whether secured, and why made by agent. * * *" (Our italics.)

Obviously the foregoing cases do not warrant the proposition that the oral mention of a (possible) claim at a hearing before the Referee can be held to be the legal equivalent of an amendment of a debtor's schedules and to constitute such an amendment.

In concluding its argument, respondent says (Brief 12):

> "Finally, the fear expressed by the petitioner that the holding below will 'make it possible for creditors in countless cases' to contend that their claims have been scheduled by reason of 'statements made at one hearing or another' (Pet. 9) are clearly exaggerated. Far from applying generally to situations where claims have simply been mentioned in passing, the *holding below relates only to the unusual facts of this case.*"

This, we submit is not answering argument but merely a bold prediction by respondent of what the courts will hold in the "countless cases" which we believe can reasonably be expected to be the outcome of the holding of the court below.

Respectfully submitted,

BILDER, BILDER, KAUFMAN,
Attorneys for Debtor-Petitioner.